No. 94-1511

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SAMUEL LEWIS, *et al.*,
Petitioners,

v.

FLETCHER CASEY, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE WASHINGTON LEGAL FOUNDATION, CONSTITUTIONAL DEFENSE COUNCIL OF THE STATE OF ARIZONA, AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

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INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center with more

than 100,000 supporters nationwide. WLF participates in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in the area of criminal justice. In that regard, WLF has participated as amicus curiae in numerous cases before this Court raising criminal law issues. *See, e.g., Arizona v. Evans*, 115 S. Ct. 1185 (1995); *Davis v. United States*, 114 S. Ct. 2350 (1994).

The Arizona Constitutional Defense Council (CDC) is an independent body created by the Arizona Legislature for the "purpose of . . . restoring, maintaining, and advancing the state's sovereignty and authority over issues that affect this state and the well-being of its citizens by taking any action it deems appropriate." A.R.S. § 41-401(B) (1994). The extraordinarily intrusive order imposed below unquestionably impinges upon Arizona's "sovereignty and authority" over the management of its prisons, an issue that plainly "affect[s] this state and the well-being of its citizens. . . ." Accordingly, CDC has joined in this brief in order to draw the Court's attention to the lower courts' unwarranted departure from this Court's right to access jurisprudence, and in particular, their requirement that Arizona provide legal assistants to certain classes of prisoners even though the State already maintains at least 19 law libraries at its nine facilities throughout the State.

The Allied Educational Foundation (AEF) is a nonprofit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including criminal and public policy. AEF has appeared before this Court along with WLF in a number of cases raising constitutional issues, including criminal cases. *See,*

e.g., Arizona v. Evans, supra; *Davis v. United States, supra*.[1]

SUMMARY OF THE ARGUMENT

This Court's cases on the right of convicted prisoners to access to the courts draw a fundamental line between State action that affirmatively inhibits a prisoner's efforts to prepare and present claims to the courts and State action that affirmatively assists such inmate efforts. The Constitution bars the former, but does not mandate the latter. By requiring Arizona to provide certain classes of inmates with the aid of legal assistants, in addition to the law libraries the State already maintains for the benefit of all prisoners, the courts below have obliterated this line.

ARGUMENT

I. THE CONSTITUTION PROHIBITS THE STATES FROM ERECTING BARRIERS TO PRISONERS' ABILITY TO BRING HABEAS CORPUS OR CIVIL RIGHTS CLAIMS BEFORE THE COURTS, BUT IT IN NO WAY REQUIRES THE STATES TO AFFIRMATIVELY ASSIST PRISONERS (OR ANY OTHER CITIZENS FOR THAT MATTER) IN BRINGING CIVIL LAWSUITS.

The central principle that this Court has enunciated and vindicated throughout its access to the courts jurisprudence is that the States may not impede prisoners' ability to

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[1] Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

present habeas corpus or civil rights claims in state or federal court. The first of the Court's cases in this area, *Ex Parte Hull*, 312 U.S. 546 (1941), invalidated a Michigan prison regulation that precluded the filing of "'legal documents, briefs, petitions, motions, habeas corpus proceedings and appeals,'" unless a prison official determined that they were "'properly drawn.'" *Id.* at 548-49. Noting even at that early date that "[t]he considerations that prompted [the regulation's] formulation are not without merit," the Court nevertheless held that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Id.* at 549; *see also Cochran v. Kansas*, 316 U.S. 255, 256-57 (1942) (prison rules prohibiting the filing of appeal papers and habeas corpus petition violate the Equal Protection Clause of the Fourteenth Amendment).[2]

The Court's subsequent cases in this area have applied this principle to strike down filing fees that precluded indigent prisoners from presenting habeas corpus petitions, *Smith v. Bennett*, 365 U.S. 708 (1961), requirements that indigent prisoners pay for transcripts of habeas proceedings, *Lane v. Brown*, 372 U.S. 477 (1963); *Long v. District Court of Lee County, Iowa*, 385 U.S. 192 (1966), and prohibitions upon inmates assisting other prisoners in the preparation of petitions for post-conviction relief, *Johnson v. Avery*, 393 U.S. 483 (1969). In each of these

[2] As the Chief Justice observed in his plurality opinion in *Murray v. Giarratano*, 492 U.S. 1, 11 & n.6 (1989), the Court's access to the courts cases have at various times grounded the right in the Due Process Clause and in the Equal Protection Clause.

cases, the Court prohibited the State from erecting a barrier that inhibited the prisoner's ability to *himself* prepare and file court papers. In none of these cases did the Court even intimate that the State must affirmatively assist in the preparation of claims by convicted prisoners.

The Court made this distinction explicit in *Ross v. Moffitt*, 417 U.S. 600 (1974), in rejecting a claim that the State must provide counsel for prisoners seeking direct, but discretionary, state appellate review of their criminal convictions and review in this Court. The Court held that cases such as *Smith* and *Lane* "stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues for more affluent persons." *Id.* at 607. The Court explained that its requirement that the State provide counsel to indigent defendants for appeals as of right, announced in *Douglas v. California*, 372 U.S. 353 (1963), "departed somewhat from the limited doctrine of the transcript and fee cases," 417 U.S. at 607, but the Court refused to extend this departure to discretionary appeals. And in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the Court confirmed that because "[p]ostconviction relief is even further removed from the criminal trial than is discretionary review, . . . [and] States have no obligation to provide this avenue of relief, . . . the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer" to inmates seeking to raise habeas corpus claims. *Id.* at 556-57 (citations omitted).

In sum, on the one hand, *Hull*, *Cochran*, *Smith*, *Lane*, and *Johnson* all stand for the proposition that the State may not prevent or inhibit a prisoner from preparing and filing claims in the courts, while, on the other hand, *Ross* and *Finley* stand for the proposition that the State need not

affirmatively assist the prisoner in formulating and presenting such claims by providing counsel. While *Bounds v. Smith*, 430 U.S. 817 (1977), may well have stretched the prior law governing access to the courts (as the persuasive dissents of Justice Stewart and then-Justice Rehnquist made clear), it certainly did not contradict the principle that the State need not affirmatively assist in the preparation of prisoner claims, as was made absolutely clear in two subsequent decisions by the Court.

In *Bounds*, the Court held that "law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825. As this language makes clear, the law library requirement is best understood as removing a state erected barrier -- the prison walls -- that would otherwise effectively preclude prisoners from presenting their own claims in court. Absent their imprisonment, inmates would be able to utilize public libraries in preparing their petitions. In this regard, *Bounds* does no more than place prisoners in the same position as citizens outside the prison walls with potential claims: each has the opportunity, unfettered by State obstruction, to research, draft, and present to the court any Constitutional (or other) claim that he might have.

The fact that the Court permitted States, as an "alternative" to law libraries, to provide legal assistance through, *inter alia*, trained inmates, paralegals, or clinical programs, *see id.* at 830-31, does not transform *Bounds* into a mandate that States must assist prisoners in the preparation of their claims. The plain purpose of this portion of the Court's holding was to vindicate this Court's traditional policy of providing prison administrators with

the maximum discretion possible consistent with the Constitution. *See id.* at 833 ("Prison administrators thus exercised wide discretion within the bounds of constitutional requirements in this case."). As the Court has repeatedly observed, "'the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree.' Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safely*, 482 U.S. 78, 84-85 (1987) (quoting *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974)).

Recognizing the considerable expense associated with the establishment of a law library, the *Bounds* Court simply noted that States have the option of employing substitute methods for making the information contained in a law library available to prisoners. *Bounds* did not, however, purport to *require* States to make trained legal assistants available to inmates. To the contrary, the Court made it clear that legal assistants were not necessary when the State provides a law library, and took pains to emphasize that "a legal access program need not include any particular element we have discussed . . . ." 430 U.S. at 832.

Any doubt about the scope of the right to access recognized in *Bounds* has been removed by the recognition, in this Court's subsequent decisions in *Finley* and *Murray v. Giarratano*, 492 U.S. 1 (1989), that States may leave inmates "to [their] own resources in collateral proceedings." *Id.* at 20 (Stevens, J., dissenting). As noted above, *Finley* applied the Court's ruling in *Ross* to hold that the State need not provide counsel to inmates seeking

habeas corpus. 481 U.S. at 556-57. Two Terms later, in rejecting a claim that prisoners under a sentence of death seeking state post-conviction relief are entitled to counsel, the Court addressed the argument that *Finley* was somehow limited by the requirement of *Bounds* that States provide law libraries to enable prisoners to prepare their own petitions seeking judicial relief. Observing that "it would be a strange jurisprudence that permitted the extension of that holding to partially overrule a subsequently decided case such as *Finley*," 492 U.S. at 11, the Chief Justice, speaking for a plurality of four justices, held that *Finley* "necessarily imposes limits on *Bounds*." *Id.* at 12. [3]

Even the dissent characterized *Finley* as holding that it is "permissible to leave an ordinary prisoner to his own resources in collateral proceedings," *id.* at 20 (Stevens, J., dissenting), and sought to distinguish capital cases from the prevailing rule on the basis of the fundamentally different nature of the death penalty, the peculiar features of Virginia's post-conviction review of capital cases, and on the unique restrictions placed on death row inmates, *see id.* at 20-28 (Stevens, J., dissenting).

In short, this Court's right of access cases have drawn a distinct line: the States may not constitutionally place barriers inhibiting the ability of prisoners to prepare and present petitions to the courts, but States need not affirmatively assist inmates in the preparation of their

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[3] As Justice O'Connor noted, Justice Kennedy's opinion concurring in the judgment was not "inconsistent with the principles expressed" in the plurality opinion. *Id.* at 13 (O'Connor, J., concurring); *see also id.* at 14-15 (Kennedy, J., concurring in the judgment).

claims. *Bounds* is consistent with this standard because -- and only because -- it imposed a disjunctive requirement: law libraries *or* legal assistants. As we now explain, by converting this into a conjunctive requirement -- law libraries *and* legal assistants, the courts below disregarded both the plain language of *Bounds* and the broader logic underlying the Court's other access cases.

II. THE LOWER COURTS HAVE MISAPPLIED THIS COURT'S RIGHT OF ACCESS JURISPRUDENCE BY REQUIRING ARIZONA TO PROVIDE TRAINED LEGAL ASSISTANTS TO SPECIFIED CLASSES OF INMATES NOTWITHSTANDING THE AVAILABILITY OF LEGAL RESOURCES FOR ALL ARIZONA PRISONERS.

It is undisputed that Arizona maintains no fewer than 19 law libraries for the benefit of inmates at the nine prison facilities located throughout the State. *See* Pet. App. A at 2; 43 F.3d 1261, 1265 (9th Cir. 1994); Pet. App. B at 26-28; 834 F. Supp. 1553, 1558-59 (D. Ariz. 1993) (listing libraries). With the exception of prisoners confined to "lockdown" for security reasons (who may receive legal materials in their cells by sending a written request to the law library, *see* Pet. App. B at 21; 834 F. Supp. at 1556), neither the district court nor the court of appeals identified any prisoners who were not given physical access to one of these libraries. Nevertheless, the courts below held that Arizona's failure to provide trained legal assistants both to "lockdown" prisoners and to illiterate and non-English speaking inmates, and its failure to permit prisoners in "lockdown" to have physical access to the library violated the constitutional right of those prisoners to access to the courts. *See* Pet. App. A at 6-9; 43 F.3d at 1267-68; Pet. App. B at 41-44; 834 F. Supp. at 1566-67.

A. Due Process Does Not Demand that States Provide Trained Legal Assistants To Illiterate And Non-English Speaking Prisoners.

There is simply no basis in *Bounds* or in any other decision of this Court for requiring States that have gone to considerable expense to make law libraries available to all prisoners to undertake the additional burden of furnishing legal assistants to illiterate and non-English speaking inmates. In *Bounds*, the Court quite emphatically repeated that the right being announced was one of access to "law libraries *or* alternative sources of legal knowledge." 430 U.S. at 817 (emphasis added); *see also id.* at 825 ("law libraries *or* other forms of legal assistance") (emphasis added); *id.* at 827 ("libraries *or* other forms of legal assistance") (emphasis added); *id.* at 828 ("adequate law libraries *or* adequate assistance from persons trained in the law") (emphasis added); *id.* at 830 ("while adequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here . . . does not foreclose alternative means to achieve that goal").

Thus, *Bounds* could not be clearer that provision of a law library, in and of itself, is sufficient to ensure the prisoners' right of access. Moreover, this Court's decisions in *Ross, Finley*, and *Murray* foreclose an extension of *Bounds* to require the States to do more than abstain from interfering with these prisoners' efforts to prepare and file their claims. *See, e.g., Murray*, 492 U.S. at 12 (plurality opinion) (*Finley* "necessarily imposes limits on *Bounds*"); *id.* at 20 (Stevens, J., dissenting) (under *Finley,* it is "permissible to leave an ordinary prisoner to his own resources in collateral proceedings").

The State of Arizona has not in any way impeded these prisoners' ability to prepare and present petitions to the courts. It is true, as the courts below pointed out, that the law libraries the State makes available to all prisoners are not likely to be of much use to prisoners who cannot read English. *See* Pet. App. A at 7; 43 F.3d at 1267; Pet. App. B at 43; 834 F. Supp. at 1567. But this impediment to the presentation of successful petitions is not of the State's making. In this regard, illiterate and non-English speaking prisoners stand in the same shoes as their counterparts outside the prison walls who are unable to take advantage of public libraries to prepare their own civil rights claims. It would turn due process on its head to require the State to provide a legal assistant to help an illiterate prisoner prepare a civil rights complaint while denying such aid to his illiterate brother who has never been convicted of a crime.[4]

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[4] The court of appeals contended, without citation to the record or any other source, that this argument "overlooks the fact that the restrictions on a prisoner's liberty attendant to imprisonment prevents the prisoner from enlisting the assistance of his family, friends, and a myriad of social services and legal aid organizations that would otherwise be available." Pet. App. A at 9; 43 F.3d at 1268. To the contrary, there is no reason why an inmate cannot receive assistance from family, friends, and legal aid organizations (such as the groups that have represented respondents in this case). To be sure, the logistics of obtaining aid from these sources may be more difficult for the prisoner than for his free counterpart, but this additional inconvenience is of no constitutional moment. As this Court has repeatedly observed, "'"[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal

(continued...)

B. The Lower Courts Erred In Requiring Arizona To Document The Security Risks Inherent In Permitting Prisoners In "Lockdown" To Have Physical Access To The Law Library.

The courts below also concluded that the access to legal materials Arizona provides to prisoners in "lockdown" status was inadequate, holding that, "unless [Arizona] can demonstrate actual security risks," prison officials "may not routinely prohibit lockdown inmates from physically using the law library." Pet. App. A. at 6; 43 F.3d at 1267. In particular, following circuit precedent, the district court held that "'[s]imply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful change [sic] to explore the legal remedies that he might have. Legal research often requires browsing through various legal materials in search of inspiration . . . .'" Pet. App. B at 42; 834 F. Supp. at 1566 (quoting *Toussaint v. McCarthy*, 801 F.2d 1080, 1109-10 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)). This ruling simply does not square with this Court's precedents requiring judicial deference to prison authorities, particularly with regard to matters touching upon institutional security. *See, e.g., Thornburgh v. Abbott*, 490 U.S. 401, 409-11 (1990); *Turner*, 482 U.S. at 84-85; *Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

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[4] (...continued)
system."'" *Sandin v. Conner*, -- U.S. --, --, 115 S. Ct. --, --, 63 U.S.L.W. 4601, 4605 (1995) (citations omitted).

Under *Turner*, a prison regulation or practice that impinges upon a constitutionally protected interest may not be invalidated unless plaintiffs demonstrate that it is not "reasonably related to legitimate penological interests." 482 U.S. at 89. There can be no question that the burden on this issue is on the prisoners challenging the regulation or practice, not on prison officials as the courts below held in this case. In *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), for example, the Court reversed a court of appeals decision strikingly similar to that of the Ninth Circuit in this case. In that case, which involved an assertion of free exercise rights, the court of appeals "established a separate burden on prison officials to prove 'that no reasonable method exists by which [prisoners'] religious rights can be accommodated without creating bona fide security problems.'" *Id.* at 350 (quoting decision below). The Court flatly rejected this assignment of the burden of proof to prison authorities, holding that "the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators." *Id.* The lack of deference in the case at bar is even more egregious because, unlike in *O'Lone* where the challenged regulations completely precluded any accommodation to the prisoners' interest in participating in the religious service at issue, Arizona accommodates the exercise of the right to access to legal materials of prisoners in "lockdown" by delivering requested materials to their cells.

The lower courts' requirement that Arizona admit prisoners in "lockdown" to the law library unless and until the State provides "'documented security reasons'" for barring physical access, *see* Pet. App. A at 6; 43 F.3d at 1267 (citation omitted), cannot stand because it frustrates "the ability of corrections officials 'to anticipate security

problems and to adopt innovative solutions to the intractable problems of prison administration,' and [it fosters] unnecessary intrusion of the judiciary into problems particularly ill suited to 'resolution by decree.'" *O'Lone*, 482 U.S. at 349-50 (quoting *Procunier v. Martinez*, 416 U.S. at 405). Neither respondents nor the courts below even attempted to demonstrate that Arizona's practice of denying prisoners in "lockdown" physical access to the library is not "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Nor could they, for Arizona's eminently sensible determination that inmates posing enough of a security risk to justify segregation in "lockdown" should not be permitted to roam freely through the law library obviously advances an unquestionably legitimate penological interest.

Finally, the lower courts insisted that *Bounds* requires Arizona to provide legal assistants to "inmates deemed security risks and denied [physical] access to the library." Pet. App. A at 7; 43 F.3d at 1267; *see also* Pet. App. B at 42; 834 F. Supp. at 1566 ("if the state denies physical access to the law library, the state must provide that prisoner with legal assistance"). Of course, *Bounds* said nothing of the sort. It merely held that States must provide "adequate law libraries *or* adequate assistance from persons trained in the law." 430 U.S. at 828 (emphasis added). Nothing in the Court's opinion purported to deprive corrections officials of the discretion to determine the logistics of providing access to the law library to those prisoners found to be security risks. To the contrary, Arizona's decision to provide prisoners determined to be security risks access to the library by bringing requested legal materials to their cells appropriately accommodates the asserted constitutional right while at the same time preserving "due regard for the 'inordinately difficult

undertaking' that is modern prison administration." *Thornburgh v. Abbott*, 490 U.S. at 407 (quoting *Turner*, 482 U.S. at 85).

CONCLUSION

The courts below have lost sight of the deference federal courts must maintain for the decisions of the State officials charged with the responsibility of operating prison systems. This is not a case where Arizona has ignored the constitutional right claimed by the inmates. To the contrary, Arizona has expended considerable resources in a good faith effort to comply with the mandate of *Bounds*, and as a result, the State's 15,346 inmates enjoy the benefit of at least 19 law libraries spread among nine prison facilities. The lower courts' dissection of Arizona's legal access program amounts to nothing more than what this Court condemned at the close of the last Term as "the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Sandin*, 63 U.S.L.W. at 4604.

For the foregoing reasons, *amici* respectfully urge the Court to reverse the judgment of the court of appeals, and return the authority to administer the Arizona prison system to the appropriate State officials.

Respectfully submitted,

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